COMMERZBANK (SOUTH EAST ASIA LTD)

v.

TOW KONG LIANG

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL WAHAB PATAIL J
[ORIGINATING SUMMONS NO: 24-1794-1999]
9 JANUARY 2002

RECIPROCAL ENFORCEMENT OF JUDGMENTS: *Setting aside registration of foreign judgment - Application by defendant - Whether defendant submitted to jurisdiction of Singapore court when he neither appeared nor took substantive part in proceedings therein - Service of writ of summons and copy of order of Singapore court - Whether there was compliance with O. 65 rr. 2 & 3 Rules of the High Court 1980 - Whether non-compliance an exercise of sovereignty in Malaysia by Singapore court - Whether enforcement of Singapore judgment would be contrary to public policy in Malaysia*

The defendant applied to set aside the registration of a Singapore judgment against him under s. 5 of the Reciprocal Enforcement of Judgments Act 1958 ('Act 99'). The defendant claimed that he had not submitted to the jurisdiction of the Singapore court as he had neither appeared nor took part in the proceedings therein. Further, that service of the sealed copy of the writ of summons issued by the Singapore court in the Singapore action against the defendant and a copy of the order of the Singapore court in that action was by a private agent contrary to O. 65 of the Rules of the High Court 1980 ('RHC'). Apart from the above, the defendant asserted that the plaintiff was illegally engaged in banking activities in Malaysia and that the securities deposited for the loan facility granted by the plaintiff and guaranteed by the defendant were shares in Malaysian companies. Also, that the purpose of the loan facility was partially for the purchase of shares in a Malaysian company, Malex Industries Bhd, the balance being for investment purposes. As such, the enforcement of the Singapore judgment would be contrary to the Banking and Financial Institutions Act 1989 ('Act 372') and the Exchange Control Act 1953 ('Act 17').

Held:

[1] Since the defendant had, before the commencement of the proceedings specifically agreed, in respect of the subject matter of the proceedings under the guarantee to submit to the jurisdiction of the courts of Singapore, the defendant was caught by s. 5(2)(a)(iii) of Act 99 whereby the Singapore court shall be deemed to have jurisdiction. That the defendant neither appeared nor took a substantive part in the proceedings in the Singapore Court was, therefore, immaterial. (pp 99 h-i & 100 a)

[2] An application under s. 5 of Act 99 is not the occasion to review the decision of the High Court of Singapore as to whether or not judgment in default of appearance ought to have been entered in Singapore. It is not for this court to look into the Singapore laws with regard to service in a foreign country, and in particular, in Malaysia. It was sufficient for consideration under ss. 4 and 5 of Act 99 that the court in Singapore had entered judgment and that judgment was produced before the court in Malaysia. (p 100 e)

[3] The defendant failed to show that the loan facility was in fact used for the purchase of shares in the Malaysian company. Given that the purpose of the loan facility was stated as being partially for the purpose of shares in the Malaysian company, and that the balance for investment purposes, it was not a foregone conclusion that the loan facility was in fact utilised for the purpose of shares in that Malaysian company, since if approval of the Controller under s. 11 of Act 17 was not obtained, the facility would appear to be capable of being used for other investment purposes. In any case, the approval of the Controller is required for the issue of shares, and not for the loan facility for the purpose of buying the said shares. The defendant failed in his reliance upon s. 11. (p 101 f-g)

[4] The plaintiff provided ample particulars of evidence of a normal banking transaction. There was no doubt that the defendant failed to place before the court any credible case that the plaintiff was conducting banking business in Malaysia as to warrant consideration whether there was a breach of s. 4 of Act 372 and that such breach required the application of s. 5(1)(a)(v) of Act 99. (p 104 a-b)

[5] The service of judicial process in a foreign country is an exercise of sovereignty in that country. The issue of being contrary to public policy arises from allowing the enforcement of the foreign judgment in Malaysia where an exercise of sovereignty has been made in Malaysia without its consent, and does not question the right of the judicial authorities in Singapore to make their own rules for actions and enforcement of judgments within Singapore in such cases. (p 104 f-i)

[6] A letter of request from a court or other tribunal of a foreign country requesting service upon a person in Malaysia must be received by the Minister who sends the same to the High Court with an intimation that it is desirable that effect should be given to the request. Service will then be effected by the process server. This procedure embodies the giving of consent to the exercise of sovereignty in Malaysia by the foreign country by the service of the process of its court or other tribunal. Clearly, the procedure under O. 65 r. 2 RHC had not been complied with in the present case. (p 106 b-c)

[7] Rule 3 of O. 65 RHC provides an alternative procedure to the service of foreign legal process, *ie*, under a Civil Procedure Convention that subsists between a foreign country and Malaysia, the request for service upon a person in Malaysia may be made directly to the Registrar by a consular or other authority of that foreign country. The plaintiff had not complied with either one of these two alternatives and it would be contrary to public policy in Malaysia to allow the enforcement of the Singapore judgment which was obtained consequent upon a failure to observe the said rules. (pp 106 d-i & 107 a-d)

[Application allowed; registration of judgment set aside with costs.]

Case(s) referred to:

Afro Continental Nigeria Ltd v. The Meridian Shipping Co SA [1982] 2 Lloyd's Rep 241 ***(refd)***

Ng Hee Thoong v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

Sunkyong International Inc v. Malaysian Rubber Development Corp Bhd [1992] 3 CLJ 1531; [1992] 1 CLJ (Rep) 310 ***(refd)***

United Overseas Bank Ltd v. Wong Hai Ong [1999] 5 CLJ 405 ***(foll)***

Legislation referred to:

Banking and Financial Institutions Act 1989, ss. 4, 6(4)

Exchange Control Act 1953, s. 11

Reciprocal Enforcement of Judgments Act 1958, ss. 4, 5(1)(a)(i), (ii), (iii), (v), (2)(a)

Rules of the High Court 1980, O. 65 r. 2

Rules of the High Court [Sing], O. 11

For the plaintiff - Shoba; M/s Shearn Delamore & Co

For the defendant - Datuk Murthi; M/s Murthi & Partners

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

A sealed copy of a writ of summons dated 11 November 1998 issued by the High Court of the Republic of Singapore Suit No. 2059 of 1998 in a Singapore action against the defendant Tow Kong Liang as second defendant, and a copy of the order of the Singapore Court in that action dated 12 November 1998 granting the plaintiff leave to serve out of jurisdiction was served personally on the defendant on 4 January 1999 by one Lim Kang San, an advocate and solicitor, who gave his address as care of No. 42(01-02) Jalan Tun Abdul Razak, Susur Satu, 80000 Johor Bahru, the plaintiff Commerzbank (South East Asia Ltd). Upon the defendant failing to enter appearance, the plaintiff obtained a judgment in default of appearance on 26 January 1999 against the defendant for the repayment of US$7,670,953.26, with interest thereon from 15 October 1998 and costs ("the Singapore judgment").

On 17 February 2000 the High Court in Malaya at Johore Bahru granted an order upon the *ex parte* application of the plaintiff Commerzbank (South East Asia Ltd) to register the Singapore judgment under s. 4 of the Reciprocal Enforcement of Judgments Act 1958 (Revised 1972) (Act 99).

The defendant filed a summons in chambers on 24 June 2000 to set aside the registration of the Singapore judgment under s. 5 of Act 99 upon the following grounds:

> That the High Court of the Republic of Singapore has no original jurisdiction in the circumstances of the case;
>
> That the Defendant, being the defendant in the proceedings in the Singapore High Court did not receive notice of those proceedings in sufficient time.
>
> That the enforcement of the judgment would be contrary to public policy in Malaysia.

The second ground was withdrawn during the course of submissions.

Jurisdiction Of The Singapore Court

The first ground arises from s. 5(1)(a)(ii) of Act 99 which provides:

> (ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case.

The defendant's submission relies upon the claim by the defendant that the Singapore Court cannot be deemed to have jurisdiction under s. 5(2)(a) of Act 99 because he had neither appeared nor taken substantive part in the proceedings in the Singapore Court. In *United Overseas Bank Ltd v. Wong Hai Ong* [1999] 5 CLJ 405, 410, Ian Chin J had concluded:

> ... In fact, the case did say that you could have a prior agreement to submit to jurisdiction. I do not see how it can be argued otherwise when section 5(2)(a)(iii) says that the court shall be deemed to have jurisdiction when a defendant has agreed to submit to the jurisdiction.

Section 5(2) of Act 99 provides as follows:

> (2) For the purposes of this section the courts of the country of the original court shall, subject to subsection (3), be deemed to have had jurisdiction:
>
> (a) in the case of a judgment given in an action *in personam*:
>
> (i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings or of contesting the jurisdiction of that court;

(ii) if the judgment debtor was plaintiff in, or counter claimed in, the proceedings in the original court;

(iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings to submit to the jurisdiction of that court or of the courts of the country of that court;

(iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or

(v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place;

The guarantee dated 18 April 1996, exhibited as exh. YYC2 in the affidavit of one Yak Yew Chee, a senior manager in the plaintiff bank, was signed by the defendant to guarantee a loan facility to Vastar Group Limited BVI, the first defendant in the Singapore action, provides specifically in cl. 29 as follows:

29. Governing Law and Jurisdiction

This guarantee shall be governed by and construed in accordance with the laws of Singapore and it is irrevocably agreed by the Guarantor for the exclusive benefit of the Bank that the courts of Singapore are to have jurisdiction to settle any disputes which may arise out of or in connection with this guarantee and that accordingly any suit action or proceeding arising out of or in connection with this guarantee (in this Clause referred to as "Proceedings") may be brought in such courts and nothing in this Clause shall limit the right of the Bank to take Proceedings against the Guarantor in the courts of any other jurisdiction in which the Guarantor has assets or a place of business or in any other court which has competent jurisdiction over the Guarantor.

The Guarantor irrevocably agrees that an appeal from the decision of the appellate court in Proceedings in Singapore may be brought by the Bank before the Judicial Committee of the Privy Council and agrees to be bound by the decision of the Judicial Committee of the Privy Council in such appeal.

In the light of cl. 29 of the guarantee signed by the defendant, s. 5(2)(a)(i) is irrelevant. Since the defendant had, before the commencement of the proceedings specifically agreed, in respect of the subject matter of the proceedings under the guarantee, to submit to the jurisdiction of the courts of Singapore, the defendant is caught by s. 5(2)(a)(iii) whereby the Singapore

court shall be deemed to have jurisdiction. That the defendant had neither appeared nor taken a substantive part in the proceedings in the Singapore Court is therefore immaterial.

That The Enforcement Would Be Contrary To Public Policy In Malaysia

This ground arises from s. 5(1)(a)(v) of Act 99 which provides:

> (v) that the enforcement of the judgment would be contrary to public policy in Malaysia;

Two matters were relied upon under this ground that enforcement of the judgment would be contrary to public policy:

> a) That the enforcement of the judgment would be contrary to the Banking and Financial Institutions Act 1989 (Act 372) and the Exchange Control Act 1953 (Act 17), and
>
> b) That service by a private agent is against public policy.

It is trite law that an application under s. 5 of Act 99 is not the occasion to review the decision of the High Court of Singapore as to whether or not judgment in default of appearance ought to have been entered in Singapore. It is not for this court therefore to look into the Singapore laws with regard to service in a foreign country, and in particular, in Malaysia. I would not therefore touch upon O. 11 of the Rules of the High Court of the Republic of Singapore. It is sufficient for consideration under ss. 4 and 5 of Act 99 that the court in Singapore has entered judgment, and that judgment is produced before the court in Malaysia.

The defendant had asserted in his affidavit of 20 June 2000 that the plaintiff was illegally engaging in banking activities in Malaysia. Specifically, it was asserted that the offer of the loan facility was made by the plaintiff's agent in Malaysia, and in view of the provisions of B and the Exchange Control Act, the funds were disbursed to an inactive and insolvent company registered in the British Virgin Islands and the defendant was made a guarantor to the company. It was further alleged by the defendant that the said company was a shelf company of the plaintiff bank and that the defendant was guaranteeing a loan extended to the plaintiff's company. It was submitted that the scheme was implemented to circumvent the laws of Malaysia.

The defendants relied upon s. 11 of the Exchange Control Act (Act 17) which provides:

11. Issue of securities.

(1) Except with the permission of the Controller, no person shall, in Malaysia, issue any security or do any act which involves, is in association with or is preparatory to the issuing outside Malaysia of any security which is registered or to be registered in Malaysia, unless the following requirements are fulfilled:

(a) neither the person to whom the security is to be issued nor the person, if any, for whom he is to be a nominee is resident outside the scheduled territories; and,

(b) the prescribed evidence is produced to the person issuing the security as to the residence of the person to whom it is to be issued and that of the person, if any, for whom he is to be a nominee.

The defendant had submitted that the securities deposited for the loan are shares in Malaysian companies, and the purpose of the loan facility is expressed as being partially for the purchase of shares in a Malaysian company, Malex Industries Bhd, and the balance for investment purposes.

The purpose of the loan is disclosed in exh. YYC5, a credit facility letter dated 9 June 1997, in the affidavit of one Yak Yew Chee. It is addressed to Vastar Group Limited BVI, and its terms were agreed to by the defendant as guarantor. The purchase by Vastar Group Limited BVI of shares in Malex Industries Bhd would be in breach of s. 11 of Act 17, if permission of the Controller is not obtained. Since it is the defendant who asserts that the loan facility is in breach of s. 11 of Act 1 7, the onus is upon him to prove that the funds were in fact applied to the purchase of shares in Malex Industries Bhd. The defendant failed to show that the loan facility was in fact used for the purchase of shares in Malex Sdn Bhd. Given that the purpose of the loan facility was stated as being partially for the purchase of shares in a Malaysian company, Malex Industries Bhd, and the balance for investment purposes, it is not a foregone conclusion the loan facility was in fact utilised for the purchase of shares in that Malaysian company, since if approval was not obtained, the facility would appear to be capable of being used for other investment purposes. In any case the approval of the Controller under s. 11 is required for the issue of shares, and not for the loan facility for the purpose of buying the said shares. I would hold that the defendant fails in his reliance upon s. 11.

The defendant had also relied upon the assertion that the plaintiff bank was conducting banking business in Malaysia without a valid licence granted under s. 6(4) the Banking and Financial Institutions Act 1989 (Act 372), an activity prohibited by s. 4 thereof. The issue is a factual one of whether the plaintiff bank was in fact conducting banking business in Malaysia.

It was averred by Yak Yew Chee in his affidavit that:

6.1 The banking facilities extended to the Borrower by the Judgment Creditor were extended at the request of the Judgment Debtor, and not as alleged in paragraph 11 of Tow's 1st Affidavit.

6.2 The Borrower, a company incorporated in the British Virgin Islands, started off as a shelf company and was acquired by the Judgment Debtor and his partner Mr. Arulananda a/l K. Manickam from Offshore Incorporated Ltd., an entity which *inter alia* incorporates and sells shelf companies. The Judgment Creditor merely provided assistance, as part of its overall customer service, for the acquisition of the said shelf company by the Judgment Debtor. At all material times, the beneficial ownership of the Borrower company remained with the Judgment Debtor. The Judgment Creditor also assisted the Judgment Debtor further by subsequently facilitating the handling of the administration of the Borrower by an affiliated company, *viz* Commerzbank International Trust (Singapore) Ltd ("CITS"). This assistance was at the express request of the Judgment Debtor. There was never any intention that the Borrower was to be a nominee of the Judgment Creditor, nor was there any logical reason why it ought to be so. CITS subsequently resigned as administrator of the Borrower Company.

6.3 The allegation in paragraph 13 of Tow's 1st Affidavit that initially the letter of offer was issued in the Judgment Debtor's name is untrue. The letter of offer of banking facilities was issued in the name of the Borrower. A copy of the letter of offer dated 3.4.96 is now produced and shown to me and marked as exhibit "YYC-5". In the circumstances, the allegation in paragraph 15 of Tow's 1st Affidavit that he was guaranteeing a loan to a nominee of the Judgment Creditor is again baseless and untrue.

6.4 By reason of the matters set out above, the allegation in paragraphs 14 and 16 of Tow's 1st Affidavit that the whole loan transaction was a contrivance to circumvent and/or subvert the Malaysian laws on exchange control, and all other allegations therein, are untrue, and are denied.

6.5 The Judgment Creditor is advised by its Malaysian solicitors that in paragraphs 17 and 18 of Tow's 1st Affidavit are incorrect, and there is no reason why enforcement of Judgment should be refused.

It was submitted for the plaintiff, relying upon *Ng Hee Thoong v. Public Bank Berhad* [1995] 1 CLJ 609 CA, that since these averments were not answered by the defendant, then it must be concluded that the facts asserted in these averments are conceded or accepted. In that case, the Court of Appeal held:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45; *Overseas Investment Pie Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82.
>
> It can be seen that there is no principle that unless an opponent's contradiction is not answered by the party making the original assertion, that party is deemed to have conceded to the contradiction. If such a principle as submitted be adopted, there will be no end to filing of affidavits, and the party that finally makes a misstep by filing out of time loses.

The plaintiff's reply above contradicted the defendant's assertion that the banking business was conducted in Malaysia, and proceeded to provide particulars. The determination whether the defendant's assertions, on a balance of probabilities, are true in order dispose of the contradiction cannot be carried out on the basis of affidavit evidence because of the particular limitations of affidavit evidence. The affidavit evidence is not evidence which has been cross-examined. Cross-examination gives the witness being cross-examined an opportunity to explain his testimony, and tests the truthfulness of a witness' testimony in respect of those facts his testimony is to be evidence of. Affidavit evidence is useful to record assertions of fact by a witness, which if accepted or at least if not disputed, or contradicted by the other party, may be accepted to establish such fact in evidence. But that is as far as the principle goes. Where it is disputed or contradicted, and the assertion of fact of either party is neither frivolous, incredible nor obviously untrue, then the proper course to determine the fact is by way of calling the deponents to give evidence orally and to be cross-examined. Once an assertion is disputed or contradicted, there is no necessity to file an affidavit to maintain the earlier assertions of fact. Indeed it is only necessary if that party intends to concede to the contrary assertion, or to demonstrate that the other party's assertions of fact in making the contradiction is frivolous, incredible or obviously untrue. Otherwise, the proper course to resolve the contradiction is by way of a trial where the deponents could be called to give oral evidence and cross-examined so that a finding of fact may be made after determining their credibility.

More to the point is that the defendant's assertions are clearly disputed in the above averments for the plaintiff, who has supplied particulars. That a bank, not shown to be other than conducting *bona fide* banking business, should lend money to a company controlled by it and would seek an individual to guarantee it is incredible. It is so inconceivable that any such allegation must be supported by particulars of evidence he relies on. No such particulars were

provided by the defendant. On the other hand, the affidavit of Yak Yew Chee filed on behalf of the plaintiff provided ample particulars of evidence of a normal banking transaction. There is no doubt that the defendant failed to place before the court any credible case that the plaintiff was conducting banking business in Malaysia as to warrant consideration whether a) there is a breach of s. 4 of Act 372 and b) that such breach requires the application of s. 5(1)(a)(v) of Act 99.

The defendant submitted that service of the writ of summons and a copy of the order of the Singapore Court by a procedure other than that authorised by O. 65 of the Rules of the High Court 1980 is an exercise of sovereignty in Malaysia by the Singapore Court other than with the consent of Malaysia, and it is therefore contrary to public policy to allow the enforcement of a judgment obtained under such an exercise.

In *United Overseas Bank Ltd v. Wong Hai Ong (supra)*, the writ and statement of claim was served upon the defendant personally in Kuching by the plaintiff's agent, and not under the provisions of O. 65 of the Rules of the High Court 1980. The facts are similar in this case. The fact that the agent executing service in this case is an advocate and solicitor is immaterial since O. 65 requires that service be effected by the process server. As such the service in this does not comply with O. 65 as at the time of the service.

That service of judicial process in a foreign country is an exercise of sovereignty in that country is well established. It was so held in *Afro Continental Nigeria Ltd v. The Meridian Shipping Co SA* [1982] 2 Lloyd's Rep 241 by Lord Denning. It was so held by the Supreme Court in *Sunkyong International Inc v. Malaysian Rubber Development Corp Bhd* [1992] 3 CLJ 1531; [1992] 1 CLJ (Rep) 310 and followed in *United Overseas Bank Ltd v. Wong Hai Ong (supra)*. In relation to s. 5(1)(a)(v) of Act 99 and O. 65 of the Rules of the High Court 1980, Justice Ian Chin J held:

> ... It goes without saying that Malaysia's policy like that of every other country is to protect its sovereignty and to expect foreign countries to respect it. For this purpose, the said rules has been enacted for the service of foreign legal process. It would be contrary to the public policy of Malaysia to condone a breach of the said rules. Therefore, it would be contrary to public policy in Malaysia to allow the enforcement of a judgment that was obtained consequent upon a failure to observe the said rules.

For the removal of doubt, the issue of being contrary to public policy arises from allowing the enforcement of that judgment in Malaysia where an exercise of sovereignty has been made in Malaysia without its consent, and does not question the right of the judicial authorities in Singapore to make their own rules for actions and enforcement of judgments within Singapore in such cases.

Order 65 r. 2 of the Rules of the High Court 1980 therefore made provision for the service of foreign legal process, including citations in Malaysia. It is as follows:

2. Service of foreign legal process (O. 65 r. 2)

(1) This rule applies in relation to the service of any process required in connection with civil proceedings pending before a court or other tribunal of a foreign country where a letter of request from such a tribunal requesting service on a person in Malaysia of any such process sent with the letter is received by the Minister and is sent by him to the High Court with an intimation that it is desirable that effect should be given to the request.

(2) In order that service of the process may be effected in accordance with this rule the letter of request must be accompanied by a translation thereof in English, by 2 copies of the process to be served and by 2 copies of a translation of the process in English.

(3) Subject to paragraph (4) and to any written law which provides for the manner in which documents may be served on bodies corporate, service of the process shall be effected by leaving a copy of it and of the translation with the person to be served.

Service shall be effected by the process server.

(4) Where an application in that behalf is made by the Attorney General, the Court may make an order for substituted service of the process, and, where such an order is made, service of the process shall be effected by taking such steps as the Court may direct to bring the process to the notice of the person to be served.

(5) After service of the process has been effected or (if such be the case) attempts to effect service of it have failed, the process server shall file a copy of the process, an affidavit made by the person who served, or attempted to serve, the process stating when, where and how he did or attempted to do so, a copy of that affidavit and a statement of the costs incurred in effecting, or attempting to effect, service.

(6) The Registrar shall give a certificate in Form 14:

(a) identifying the documents annexed thereto, that is to say, the letter of request for service, a copy of the process received with the letter and a copy of the affidavit referred to in paragraph (5);

(b) certifying that the method of service of the process and the proof of service are such as are required by the rules of the High Court regulating the service of process of the Court in Malaysia or, if such be the case, that service of the process could not be effected for the reason specified in the certificate; and

(c) certifying that the cost of effecting, or attempting to effect, service is the amount so specified.

(7) The certificate given under paragraph (6) shall be sealed with the seal of the High Court for use out of the jurisdiction and shall be sent to the Minister.

A letter of request from a court or other tribunal of a foreign country requesting service upon a person in Malaysia must be received by the Minister who sends the same to the High Court with an intimation that it is desirable that effect should be given to the request. Service will then be effected by the process server. This procedure embodies the giving of consent to the exercise of sovereignty in Malaysia by the foreign country by the service of the process of its court or other tribunal. Clearly the procedure under O. 65 r. 2 had not been complied with.

Order 65 of the Rules of the High Court 1980 provides an alternative to the above, as follows:

3. Service of foreign legal process under Civil Procedure Convention (O. 65 r. 3)

(1) This rule applies in relation to the service of any process required in connection with civil proceedings pending before a court or other tribunal of a foreign country, being a country with which there subsists a Civil Procedure Convention providing for service in Malaysia of process of the tribunals of that country, where a letter of request from a consular or other authority of that country requesting service on a person in Malaysia of any such process sent with the letter is received by the Registrar.

(2) In order that service of the process may be effected in accordance with this rule the letter or request must be accompanied by a copy of a translation of the process to be served in English.

(3) Subject to any written law which provides for the manner in which documents may be served on bodies corporate and to any special provisions of the relevant Civil Procedure Convention, service of the process shall be effected by leaving the original process or a copy of it, as indicated in the letter of request, and a copy of the translation with the person to be served.

Service shall be effected by the process server.

(4) After service of the process has been effected or (if such be the case) attempts to effect service of it have failed, the process server shall file an affidavit made by the person who served, or attempted to serve, the process stating when, where and how he did or attempted to do so, and a statement of the costs incurred in effecting, or attempting to effect, service.

(5) The Registrar shall give a certificate certifying:

(a) that the process or a copy thereof, as the case may be, was served on the person, at the time, and in the manner, specified in the certificate or, if such be the case, that service of the process could not be effected for the reason so specified; and

(b) that the cost of effecting, or attempting to effect, service is the amount so specified.

(6) The certificate given under paragraph (5) shall be sealed with the seal of the High Court for use out of jurisdiction and shall be sent to the consular or other authority by whom the request for service was made.

Thus where there is a Civil Procedure Convention between the foreign country and Malaysia, the request, with minor difference from the O. 65 r. 2 procedure, may be made directly to the registrar by way of a request from a consular or other authority of that foreign country.

The plaintiff had not complied with either one of these two alternatives and it would be contrary to public policy in Malaysia to allow the enforcement of the judgment which was obtained consequent upon a failure to observe the said rules. The application by the defendant in encl. 11 is therefore allowed and the registration in Malaysia of judgment No. 2059 dated 26 January 1999 of the High Court of Singapore is set aside with costs.